Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

CONTECH DIVISION, SPX CORPORATION,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does it violate an employer's First Amendment rights for the NLRB to overturn the results of a union election based upon the employer's statements to its employees during the campaign where those statements are permitted under 29 U.S.C. § 258(c)?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, the respondents include International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

Petitioner, Contech Division, SPX Corporation is a division of SPX Corporation which is a publicly traded corporation.

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## CITATIONS OF REPORTS OF OPINIONS AND ORDER BELOW

1. The Hearing Officer's Report and Recommendations on Objections of the National Labor Relations Board, Seventh Region, was filed on April 17, 1995 (Pet. App. 70a).

2. The Decision and Direction of Second Election of the National Labor Relations Board was filed on December 19, 1995, and is reported at 320 N.L.R.B. No. 52 (Pet. App. 22a).

3. The Regional Director's Report and Recommendation on Objections to Conduct Affecting the Results of the Election, of the National Labor Relations Board, Seventh Region, was filed on April 2, 1996 (Pet. App. 60a).

4. The Decision and Certification of Representation of the National Labor Relations Board was filed on August 5, 1996 (Pet. App. 40a).

5. The published decision of the panel of the Court of Appeals for the Sixth Circuit was filed on December 30, 1998, and is reported at 164 F.3d 297 (Pet. App. 1a).

6. The Order of the Court of Appeals for the Sixth Circuit denying rehearing with suggestion for rehearing *en banc* was filed on March 11, 1999 (Pet. App. 68a).

## STATEMENT OF JURISDICTION

Petitioner seeks review of a published Opinion of the United States Court of Appeals for the Sixth Circuit in a case involving the interpretation and application of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. The panel decision was filed on December 30, 1998, and is reported at 164 F.3d 297 (6th Cir. 1998) (Pet. App. 1a). The Order denying rehearing with suggestion for rehearing *en banc* was filed on March 11, 1999. This Petition for Certiorari is filed within the 90 days of that March 11, 1999 Order. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final judgment or decree of the Court of Appeals for the Sixth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following constitutional and statutory provisions:

1. The First Amendment of the United States Constitution, U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5):

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Section 8(c)(5) of the National Labor Relations Act, 29 U.S.C. § 158(c)(5):

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

## CONCISE STATEMENT OF THE CASE

This case involves employer free speech during a union organizing campaign. In a Board sponsored election, employees of the Petitioner, Contech Division, SPX Corporation ("Contech"), voted against union representation by a vote of 196 to 154. The union objected to certain of

Contech's campaign statements. The Board overturned that election because of what Contech's representatives said during the election campaign even though employer's speech was lawful under Section 8(c) of the National Labor Relations Act ("NLRA") (29 U.S.C. § 158 (c)) and protected by the First Amendment of the United States Constitution.

After a second election where the employees voted in favor of union representation by a vote of 184 to 150, Contech refused to bargain with the UAW because it believed that the first election was improperly overturned in violation of its right to free speech. Contech was charged with unfair labor practices for refusing to bargain. The Board upheld those charges and ordered Contech to bargain.

Contech timely filed a petition for review by the United States Court of Appeals for the Sixth Circuit. That Court had jurisdiction over the petition pursuant to Section 10(f) of the NLRA, 29 U.S.C. § 160(f). The Board filed a cross-application for enforcement of its final order. The Sixth Circuit had jurisdiction over that cross-application under 10(e) of the NLRA, 29 U.S.C. § 160(e). The Sixth Circuit enforced the Board order. Contech timely filed this Petition for Writ of Certiorari.

The cornerstone of the National Labor Relations Act ("NLRA or the "Act") is the protection of the employees' right to join or not to join a labor organization. Practically, employees make that choice in the context of union organizing campaigns that occur in workplaces throughout the United States on a daily basis. There were over 217,000 elections in 1997 alone. An election is initiated generally through the filing of a petition for an election by a union, after which an election date is set by the National Labor

Relations Board ("NLRB") — generally no further than 42 days from the filing of that petition for election. During this short time period, employees have been bombarded by the union and by the employer with facts, propaganda, opinions, stories, videos and meetings that tell them why they should or should not join a particular union. Unlike general elections, in union elections typically 95% or more of the employees vote.

In making this critical decision, employees need the facts from *both* sides. If employees are allowed to hear only one side of the story, only that side of the story will prevail.

Fortunately, Congress and this Court have long recognized that employer free speech is not lost in an election. Congress recognized it in passing Section 8(c) of the NLRA, 29 U.S.C. § 158(c), which states in pertinent part:

> The expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefits.

The United States Supreme Court in *NLRB v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 617 (1969), explained that Section 8(c) is grounded in the First Amendment's protection of the employer's right to free speech and represents in effect a safe harbor created by Congress for employer statements during an organizational campaign:

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by the union or the Board. Thus, Section 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expressions of "any views, argument or opinion" shall not "be evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of a benefit" in violation of § 8(a)(1).

The Court noted that under Section 8(c) an employer could state his views as long as there were no "threats or reprisal" and went on to describe the parameters for predictions about the future:

> He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

*Gissel*, 395 U.S. at 618.

In this case, Contech fully complied with Section 8(c) in its statements during the union election campaign. It informed its employees of what it saw as the negative consequences of a union. It did not threaten its employees. It did not promise them a benefit. No unfair labor practice

charge was filed against it for its comments. Nevertheless, the Sixth Circuit held that the Board could overturn the election anyway holding that Section 8(c) only protects an employer against an unfair labor practice charge, but does not limit the NLRB's right to overturn an election based upon employer comments which are not an unfair labor practice:

> Because Section 8(c) only applies to unfair labor practice charges, Contech's assertion that it effectively precludes the Board from setting aside the first election is without merit. The Board may set aside on election even though an employer's conduct does not use to the level of an unfair labor practice. See *Tennessee Packers*, *supra*, 379 F.2d at 181.

*Contech Division, SPX Corporation v. N.L.R.B.*, 164 F.3d 297 (6th Cir. 1998) (Pet. App. at 18a).

## REASONS FOR GRANTING THE WRIT

This case is appropriate for consideration by this Court based upon Rule 10(a) and (c) of the Rules of the Supreme Court of the United States Under Rule 10(a), a factor for this Court to consider is whether a:

> United States court of appeals has entered a decision in conflict with decision of another United States court of appeals on the same important matter.

Rule 10(c) states that another factor for the Court to consider is whether:

> a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . .

The Sixth Circuit's decision holding that the NLRB may overturn an election based upon employer statements that do not violate Section 8(c) and are protected by the first amendment raises an important issue of federal law which has not been and should be settled by this Court. The Sixth Circuit cited *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1967), for the principle that an election can be overturned where a party's conduct interferes with the freedom of choice in an election even though the conduct does not constitute an unfair labor practice, but *Tennessee Packers* did *not* involve conduct protected by Section 8(c). It certainly does not stand for the proposition that the Board can overturn an election simply because the employer exercised its right to free speech.

In past cases where parties have objected to employer statements during an election but have not filed unfair labor practice charges, the Board itself has used Section 8(c) for analyzing the validity of the objection. *Diner's Drive-In, Inc.*, 280 NLRB 971 (1986); *Associated Roofing & Sheet Metal Co., Inc.*, 255 NLRB 1349 (1981); *The McLaughlin Company*, 187 NLRB 897 (1971); *Honeywell, Inc.*, 225 NLRB 617 (1976); *Turner Shoe Company, Inc.*, 249 NLRB 144 (1980); *Mohawk Bedding Company*, 204 NLRB 277 (1973); *Warren W. Parke*, 219 NLRB 546 (1975). Indeed, in its brief to the Sixth Circuit in this case, the Board argued that its decision complied with *Gissel*, which interpreted Section 8(c), rather than arguing that Section 8(c) did not apply. (NLRB Final Brief at 15-17).

If the Sixth Circuit's decision is allowed to stand, an employer's right to free speech in a union election campaign will be gone. Section 8(c), the past guideline for analyzing employer's comments, will be irrelevant. The NLRB can simply set aside elections when the employer make statements which comply with Section 8(c). The fact that the statements cannot be used as evidence of an unfair labor practice charge makes no practical difference. The result is the same. The Board can overturn the election. Since the employer has no standard for analyzing what it can say, it is at risk of an overturned election if it says anything at all. A decision which has such significant implications warrants review by this Court.

Further, the decision in this case conflicts with the recent decision of the District of Columbia Court of Appeals in *US Airways, Inc. v. National Mediation Board and Communications Workers of America, AFL-CIO*, 1999 WL 335366 at 4 (DC Cir. 5/28/99). In *US Airways, Inc.*, the Court reversed a United States District Court decision which rejected US Airways' claim that the National Mediation Board had violated its first amendment rights by limiting US Airways' comments during a union election campaign. Although the case arose under the Railway Labor Act, the D.C. Circuit rejected the argument that the first amendment analysis would be different under that act; holding:

> In short, the Board provides us with nothing to support its claim that the key characteristic of representation elections identified by the Gissel Court as mandating lesser-than-usual First Amendment protection of employers' expression — the economic dependence of employee on

> employer — should be thought of differently when that employer is a carrier governed by the RLA.

The D.C. Circuit then set aside a rerun election because it found that the National Mediation Board ("NMB") had interfered with the employer's first amendment rights by telling the employer in advance what it could not say or do during the representation campaign. In particular, the Court found that NMB had acted improperly in prohibiting the employer from predicting that if the union was elected the employer could no longer use its employee roundtable groups. The Court held:

> To be sure, U.S. Airways might have explained more precisely just what it was about the roundtables that was inconsistent with union representation. "But if unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, . . . the employer's speech is not free in any practical sense." Crown Cork, 36 F.3d at 1140 (holding protected an employer's prediction that unionization would increase costs, risking the loss of cost-sensitive projects and consequent layoffs, notwithstanding employer's failure to emphasize that the loss of such projects was only a risk and not an absolute certainty).

(*Id.* at 7).

The *US Airways* decision recognizes that an employer's First Amendment rights are protected by Section 8(c) and

an employer has a right to predict the impact of a union election. The Sixth Circuit decision in this case says the opposite. This issue needs to be resolved by this Court.

Perhaps sensing the confusion and potentially disastrous effects of its sweeping ruling, the Sixth Circuit attempted to justify the ruling by stating that it would have reached the same result even if Section 8(c) applied, holding:

> Furthermore, even if we were to apply Section 8(c)'s language to the election context, we note that the employer's expression of its views is protected only "if such expression contains no threat of reprisal. . . ." Where Contech crossed the line in the present case is not its use of the handouts, posters, and newspaper articles showing job losses elsewhere that Contech attributed to union representation, but in the linking of such literature to its own intimidating conduct in transferring production of the Ford part to another Contech plant without explanation, in its timing of the quality — inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials. The Board in effect concluded that Contech's overall conduct contained the threat of reprisal, thus denying the employees a free and fair election choice.

*Contech Division, SPX Corporation v. NLRB*, 164 F.3d 297 (6th Cir. 1998) (Pet. App. at 18a-19a).

There are two flaws with this rationalization. First, it does not change the fact that the Sixth Circuit has adopted a sweeping rule for that Circuit which chills an employer's first amendment right to express its opinion. If the panel believed Section 8(c) was violated, it did not need to make the sweeping ruling that Section 8(c) does not apply to objections to election.

Second, in analyzing that the NLRB "in effect" concluded that Contech violated 8(c), the Sixth Circuit ignored the fact that there was no evidence in the record to support that conclusion.

The Sixth Circuit acknowledged that Contech's handout of newspaper articles describing job losses elsewhere in the face of unionization was acceptable. It nevertheless concluded that the Board found the conduct unacceptable because of the transfer of the production of a Ford part to another Contech plant. However, record evidence concerning the transfer does not support the conclusion. Joe Barry testified that the Ford part work was initially "kicked off in our Auburn, Indiana facility." (Joseph Barry, Tr. 300) (Pet. App. at 121a). Auburn is primarily focused on Ford and Ford is very comfortable with "the quality and delivery coming out of Auburn." (Joseph Barry, Tr. 300) (Pet. App. at 121a-122a). However, around March of 1994, the Auburn facility did not have the capacity to do all of Ford's work. Accordingly, Contech asked Ford if it would move the part to Dowagiac. Ford was "very reluctant to have the NM-12 work job sent out of Auburn and sent to Dowagiac." (Joseph Barry, Tr. 300) (Pet. App. at 122a).

To ease Ford's reluctance, Barry promised Ford that the part job would be returned to Auburn "by the end of

1994." (Joseph Barry, Tr. 301) (Pet. App. at 122a). This commitment was made in March, 1994 — more than 8 months before the petition for election was filed. Contech lived up to its commitment and the Ford part job was moved from Dowagiac to the Auburn plant in approximately December of 1994. (Joseph Barry, Tr. 301) (Pet. App. at 123a). There was absolutely no record evidence to conclude that this was a "threat or refusal" in violation of Section 8(c). The Sixth Circuit could not have enforced the Board's decision, except for its conclusion that the Board could overturn the election even if Contech did not violate Section 8(c).

Similarly, there was no evidence for the Sixth Circuit's interpretation that a "threat or reprisal" could be inferred from Contech's "timing of an inspection tour by TRW officials."

In fact, TRW, not Contech, chose the date for the inspection, but both Contech and the panel are limited by the Hearing Examiner finding that it was "not clear who was responsible for the timing of the visit. . . ." (Hearing Officer's Report at 11) (Pet. App. at 91a). In any event, there is no support in the record for the Sixth Circuit's conclusion that it was Contech's timing.

The panel cited Contech's "selective removal of union literature from the plant lunchrooms." However, the record established that the removal was *not* selective. Three supervisors engaged in this practice: Jim Rank, Ila Aurand and Jim Humphrie. Mr. Rank testified that, consistent with his job description, he cleaned the break area before, during and after the union organizing campaign. (James Rank, Tr. 195-196) (Pet. App. at 127a).

Ms. Aurand threw away both union and company literature. Any materials that were scattered about and unattended she discarded. (Ila Aurand, Tr. 230) (Pet. App. at 131a). Like all the other supervisors, Ms. Aurand's job description listed housekeeping as a duty and this is a duty she carried out. (Ila Aurand, Tr. 222-223) (Pet. App. at 128a-130a).

Mr. Humphrie picked up everything that was laying on the tables and threw it in the trash, except for the magazines. (Danny A. Truelove, Tr. 140) (Pet. App. at 132a-133a). Humphrie also testified, uncontroverted, that the mess that he picked up included "company literature, union literature [and] candy wrappers." (James Humphrie, Tr. 319) (Pet. App. at 134a-135a). Truelove testified that after Humphrie threw the union literature in the trash, Truelove went over to the trash can, removed the material from the trash and placed it back on the tables in the break area. (Brad Farver, Tr. 348) (Pet. App. at 139a-140a).

Humphrie testified without contradiction, that housekeeping is part of his job duties and that he cleaned the break areas, before, during and after the union organizing campaign. (James Humphrie, Tr. 319) (Pet. App. at 134a-135a).

Finally, the Sixth Circuit's reference to "the misleading content of certain pre-election statements made by its [Contech's] officials" was not supported by record. TRW is a parts supplier to the big three automobile companies and a customer of Contech. Contech obtained TRW's work as a result of a union strike at another company. (Memo, J-4 WW (Pet. App. at 149a-150a); Gary Walker, Tr. 337 (Pet. App. at 143a); Paul Brancaleon, Tr. 256-257) (Pet. App. at 144a-145a). Contech is now the *sole* source supplier of rack and pinion steering housings for TRW. (Joseph Barry, Tr. 279, 292) (Pet. App. at 112a; 118a-119a). In 1994, TRW

represented approximately 90% of the work in Contech Plant 3 and approximately 15% in Plant 1. (Robert K. Davis, Tr. 266) (Pet. App. at 110a-111a).

TRW and Contech's relationship is governed by a long-term agreement. (LTA) (J-4ZZ) (Pet. App. at 151a-160a). The long term agreement is dated July 15, 1991 and was due to expire on December 31, 1995. It is customary within the industry to renegotiate these long-term agreements far enough in advance (around one year) so that there is sufficient time for the supplier, such as Contech, to have the engineering completed and the proper tools in place to make the parts for the new car models. (Robert K. Davis, Tr. 266) (Pet. App. at 146a).

Joe Barry, Contech Director of Manufacturing, explained that a series of quality and delivery problems had originated in the summer and fall of 1994. (Joseph Barry, Tr. 282, 293-294) (Pet. App. at 113a; 119a-121a). During the months of September, October and November, TRW issued 46 "IRS/PRRS" which are inspection rejects or problem reports. These documents identify parts which left the Dowagiac plant certified as good parts, but which TRW discovered to be defective. Mr. Barry explained that this is a very serious problem. (Joseph Barry, Tr. 293-294) (Pet. App. at 119a-120a).

TRW also considered the union election to be a serious concern. On November 21, 1994, TRW's General Manager, Walt Kneuer telephoned Gary Walker, Contech's Division President, to express his concerns about the problems that TRW was experiencing at the Dowagiac plant. Mr. Walker memorialized this conversation in a memo and noted that Mr. Kneuer had two concerns, one of which was the union election:

His two major concerns are:

1. Why didn't we inform him sooner of the union problem in Dowagiac and the potential threat to production of his parts; and

2. We're two days away from shutting down his customer's product lines in some cases because of current production problems.

(Memo, J-4WW (Pet. App. at 149a); Gary Walker, Tr. 333-334) (Pet. App. at 141a-142a).

Concerned about the quality problems, TRW called a meeting with Contech at TRW headquarters. Mr. Barry, two quality managers and the engineering manager represented Contech in its meeting with TRW, held on November 14, 1994. (Joseph Barry, Tr. 283) (Pet. App. at 114a-115a). TRW expressed its concerns about the poor quality of product that it was receiving from Contech. TRW presented a cracked casting and asked "how could this casting ever get out of your plant?" (Joseph Barry, Tr. 283) (Pet. App. at 114a). TRW demanded to know what Contech was doing to correct those problems and wanted assurances that Contech was putting procedures in effect to contain its problems internally. (Joseph Barry, Tr. 283) (Pet. App. at 114a). Mr. Barry agreed to return on a monthly basis to report what steps Contech was taking. (Joseph Barry, Tr. 285-286) (Pet. App. at 116a-117a).

Because of the critical nature of the quality problems, Mr. Barry and the other members of management held a series of meetings in late 1994, making everyone in the plant

aware of them. (Joseph Barry, Tr. 284) (Pet. App. at 115a). As Mr. Barry explained:

> We had specific plant meetings that, that people came to, specifically in Plant 3 because that's where most of the TRW product was produced. Specifically in that plant, we had those meetings in the break room. We had one meeting per shift. We talked about the critical nature of where we were with TRW, what our concerns were.
>
> We had actually brought home some of those same castings that were presented in the TRW meeting, and we had each of us touch and feel those castings so we all had a good sense of what were those problems, specifically.

(Joseph Barry, Tr. 284) (Pet. App. at 115a).

Despite the serious quality problems that TRW was experiencing with Contech, in November of 1994, Gary Mahon (TRW's Director of Purchasing in America) contacted Robert Davis (Contech's Director of Sales and Marketing) to begin negotiations on an extension of the LTA. (Robert K. Davis, Tr. 263) (Pet. App. at 108a-109a). Sometime between November 14 and November 18, Mr. Davis met with Mr. Mahon. At the beginning of the meeting, Mr. Davis explained to Mr. Mahon that the UAW had petitioned Contech for a vote at the Dowagiac facility. Shortly thereafter, Mr. Mahon informed Mr. Davis that TRW would be postponing negotiations on the LTA until *after* the election. (Robert K. Davis, Tr. 264) (Pet. App. at 109a-110a).

Employee Shirley Stroud testified about statements allegedly made by Mr. Barry and Contech Manufacturing Manager Brad Farver concerning the negotiations of the LTA. Ms. Stroud testified that "the main thing that I remember what Joe [Barry] said about TRW is that they wouldn't sign any more contracts with us and that they didn't want any long-term contract signed until after our election." (Shirley L. Stroud, Tr. 108-109) (Pet. App. at 147a-148a).

Barry and Farver both consistently testified that they made statements about the LTA at a meeting when they introduced the Guardian Glass video. (Joseph Barry, Tr. 303-304 (Pet. App. at 123a-125a); Brad Farver, Tr. 343-345) (Pet. App. at 136a-139a)). It was true that the negotiations of the LTA were suspended because of the union campaign, but Barry and Farver also referenced the quality problems that existed with TRW. (*Id.*).

Quite simply, these statements were not "threats of reprisal." The statements did not violate Section 8(c) and the panel's only basis for enforcing the Board's Order was its decision that Section 8(c) does not protect as employer where there are objections to an election. That sweeping ruling adopts a rule which undermines the employer's first amendment rights. It should be reversed.

## CONCLUSION

For the reasons set forth herein, Contech requests that this Court grant its Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit enforcing the NLRB order.

Respectfully submitted,

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